Public Prosecutor v Chua Chor Kian

HIGH COURT (MELAKA) — CRIMINAL REVISION NO 43-1 OF 1997
SURIYADI J
18 JUNE 1997

Criminal Procedure *— Charge — Prosecution, conduct of by police officer — Accused charged under s 12(2), punishable under s 39A(2) of the Dangerous Drugs Act 1952 — Whether police can charge accused without prior consultation with Public Prosecutor — Whether failure to get Public Prosecutor's consent fatal*

Criminal Procedure *— Bail — Whether bail can be allowed if offence punishable under s 39A(2) of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 s 41B(1)*

The accused was charged under s 12(2) of the Dangerous Drugs Act 1952 ('the Act'), punishable under s 39A(2) of the same Act, without prior consultation with the deputy public prosecutor. The punishment under s 39A(2) is imprisonment for life or for a term which shall not be less than five years, and whipping of not less than ten strokes. Under s 41B(1) of the Act, bail shall not be granted by the court if the offence charged carries imprisonment for more than five years. The sessions court judge had recorded in the notes of proceedings about the lack of co-operation between the police investigator and the deputy public prosecutor's office before the charge was preferred. Despite the clear prohibition of s 41B(1), the sessions court judge allowed bail on the grounds that there was uncertainty as to the weight of the drugs and that the chemist report was unavailable. Subsequently, the matter was called up for revision and the main issue before the High Court was whether the police was justified in charging the accused for such a serious offence, without the prior leave of the deputy public prosecutor.

Held, ordering a discharge not amounting to an acquittal:

Section 41B of the Act, being a particular legislation subsequent to the Criminal Procedure Code (FMS Cap 6), must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the courts by an earlier general legislation, ie the Criminal Procedure Code (see p 170E–F); *Loy Chin Hei v PP* [1982] 1 MLJ 31, *PP v Chew Siew Luan* [1982] 2 MLJ 119 and *PP v Leong Ying Ming* [1993] 1 MLJ 177 followed.

However, as s 41B of the Act deprives an accused person of his liberty, it is the duty of the court to see that the conditions under which an accused is to be refused bail are strictly followed. On the facts of the case, the Public Prosecutor's view and considered opinion were not sought before the charge was preferred against the accused. This encroachment of duties by the police who decided to charge the accused in total disregard of the Public Prosecutor's power, not only

was against the interest of the accused but also a usurpation of the constitutional right of an institution pursuant to art 145(3) of the Federal Constitution. Furthermore, the weight of the drugs was still uncertain. The court's revisionary powers should thus be exercised in favour of the accused (see pp 173C–E and 175C–E); *Ho Huan Chong & Ors v PP* [1980] 2 MLJ 289 and *Hari Ram Seghal v PP* [1981] 1 MLJ 165 followed.

[Bahasa Malaysia summary

Tertuduh dituduh di bawah s 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39A(2) Akta yang sama, tanpa terlebih dahulu dirujuk kepada timbalan pendakwa raya. Hukuman di bawah s 39A(2) ialah pemenjaraan seumur hidup atau bagi satu tempoh melebihi lima tahun dan juga sebatan tidak kurang sepuluh kali. Di bawah s 41B(1) Akta tersebut, jaminan tidak harus dibenarkan jikalau kesalahan yang dipertuduhkan membawa hukuman penjara melebihi lima tahun. Hakim mahkamah sesyen telah merakamkan dalam nota keterangan mengenai ketiadaan kerjasama di antara penyiasat polis dan pejabat timbalan pendakwa raya sebelum pertuduhan dibuat. Sungguhpun terdapat larangan dalam s 41B(1), hakim mahkamah sesyen telah membenarkan jaminan atas alasan bahawa berat dadah belum diketahui dan bahawa laporan ahli kimia masih belum siap. Selepas itu perkara ini dipanggil untuk semakan dan isu utama di hadapan Mahkamah Tinggi ialah sama ada pihak polis berjustifikasi dalam menuduh tertuduh untuk kesalahan yang begitu serius tanpa mendapatkan kebenaran terlebih dahulu daripada timbalan pendakwa raya.

Diputuskan, memerintahkan pelepasan yang tidak merupakan pembebasan:

Seksyen 41B Akta tersebut, yang merupakan perundangan tertentu yang menyusuli Kanun Acara Jenayah (NMB Bab 6), mestilah ditafsirkan sebagai telah menyekat budi bicara untuk membenarkan jaminan dalam kesalahan dadah yang boleh dihukum dengan hukuman mati atau pemenjaraan seumur hidup yang sebelum ini diletakhak dalam mahkamah oleh perundangan yang lebih awal, iaitu Kanun Acara Jenayah (lihat ms 170E–F); *Loy Chin Hei v PP* [1982] 1 MLJ 31, *PP v Chew Siew Luan* [1982] 2 MLJ 119 dan *PP v Leong Ying Ming* [1993] 1 MLJ 177 diikut.

Namun demikian, oleh kerana s 41B Akta tersebut deprives an accused person of his liberty, adalah menjadi kewajipan mahkamah untuk memastikan bahawa syarat-syarat di bawah mana seorang tertuduh patut ditolak jaminan dipatuhi dengan ketat. Atas fakta-fakta kes, pandangan dan pendapat yang dipertimbangkan Pendakwa Raya tidak diminta sebelum pertuduhan dibuat terhadap tertuduh. Pelanggaran tugas oleh polis yang memutuskan untuk mempertuduh tertuduh dengan mengabaikan kuasa Pendakwa Raya bukan sahaja bertentangan dengan kepentingan tertuduh tetapi juga rampasan hak

perlembagaan sebuah institusi menurut perkara 145(3) Perlembagaan Persekutuan. Tambahan pula, berat dadah belum lagi tentu. Dengan itu, kuasa-kuasa semakan mahkamah harus dilaksanakan memihak kepada tertuduh (lihat ms 173C–E dan 175C–E); *Ho Huan Chong & Ors v PP* [1980] 2 MLJ 289 dan *Hari Ram Seghal v PP* [1981] 1 MLJ 165 diikut.]

Notes

For cases on charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 606–919.

For cases on bail, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 542–589.

Cases referred to

Bhupalli Malliah, Re AIR 1959 AP 477 (refd)
Datuk Hj Harun bin Hj Idris v PP [1977] 2 MLJ 155 (refd)
Hari Ram Seghal v PP [1981] 1 MLJ 165 (folld)
Ho Huan Chong & Ors v PP [1980] 2 MLJ 289 (folld)
Leong Siew Hoong v PP [1988] 1 MLJ 396 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
Loy Chin Hei v PP [1982] 1 MLJ 31 (folld)
Pride of Derby & Derbyshire Angling Association Ltd & Anor v British Celanese Ltd & Ors [1953] 1 Ch 149 (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119 (folld)
PP v Datuk Hj Dzulkifli [1982] 1 MLJ 340 (refd)
PP v Ilamaran [1992] 1 MLJ 672 (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166 (refd)
PP v Leong Ying Ming [1993] 1 MLJ 177 (folld)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 323, 376
Dangerous Drugs Act 1952 ss 12(2), 39A(2), 41B(1), (2)
Evidence Act 1950 s 114(e)
Federal Constitution arts 5, 8, 145(3), 149
Police Act 1967 ss 19–33

Anselm Fernandis (Deputy Public Prosecutor).
Accused in person.

Suriyadi J: For purposes of this revision, it is not disputed that the accused was charged under s 12(2) of the Dangerous Drugs Act 1952 ('the Act'), punishable under s 39A(2) of the Act by virtue of the weight of the drugs seized. The sentence provided under s 39A(2) is that if a person has been found guilty, he shall be punished with imprisonment for life or for a term which shall not be less than five years, and shall also be punished with whipping of not less than ten strokes. It is pursuant to this severe sentence that s 41B(1) becomes relevant. This section reads:

(1) Bail shall not to be granted to an accused person charged with an offence under this Act — A
(a) ...; or
(b) where the offence is punishable with imprisonment for more than 5 years ...; or
(c) ...

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary. B

Regardless of the above stringent provisions of s 41B(2) which may take quite a toll on the liberty of a person not yet found guilty, I must be mindful of art 5 of the Constitution which only allows acts that will curb the liberty of a citizen so long as it is done in accordance with the law. The C provision of s 41B of the Act has had its fair share of cases and I need to refer only to some of them. Wan Yahya J in the case of *Loy Chin Hei v PP* [1982] 1 MLJ 31 had occasion to say (at pp 42–43):

> I have had several occasions to look at s 41B of the Dangerous Drugs Act 1952 and it appears to me that the section contains not only express D provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code (FMS Cap 6) and other judge made laws. The expression 'notwithstanding any written law or any rule of law', to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents E on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the courts by an earlier general legislation, ie the Criminal Procedure Code. When an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express F terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

His Lordship reiterated the same stance in the case of *PP v Ilamaran* G [1992] 1 MLJ 672 when matters pertaining to the same issue arose again (see also the case of *Leong Siew Hoong v PP* [1988] 1 MLJ 396 which discussed this point and saw it fit not to allow bail). A Federal Court case which discussed s 41B is that of *PP v Chew Siew Luan* [1982] 2 MLJ 119 where at p 120 his Highness Raja Azlan Shah CJ (Malaya) (as he then H was) said:

> We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act 1952 to the provisions relating thereto in the Criminal Procedure Code (FMS Cap 6). The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and I not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard.

In the case of *PP v Leong Ying Ming* [1993] 1 MLJ 177, the above cases were referred to and the view of Raja Azlan Shah CJ (Malaya) were endorsed. Their Lordships confirmed the stance that a person who is charged for an offence punishable with imprisonment for life or for a term which shall not be less than five years is not bailable under the specific provisions of s 41B of the Act.

With this legal background established, I now must scrutinize the notes of the proceedings and decide whether all the relevant parties involved in the process of criminal justice have carried out their duties in accordance with the law. From the available evidence, it is noted that the accused has been detained for no less than four days, from the date of arrest, ie 25 April 1997 until 28 April 1997, which is the date of the charge. The prosecuting officer, on the advice of the investigating officer, has supplied the information that the accused was found to be in possession of 6.5g of heroin. The net weight is still not certain.

The facts are simple enough but what perturbed me was the blatant act of the police officer to charge the accused without any prior consultation with the deputy public prosecutor. Article 145(3) reads that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial. The Public Prosecutor is construed to have exercised his discretion when he institutes a criminal case, ie commencing any criminal proceedings which has not yet begun. As for the root word 'conduct', I would like to refer to the case of *Pride of Derby & Derbyshire Angling Association Ltd & Anor v British Celanese Ltd & Ors* [1953] 1 Ch 149 where Evershed MR at p 167 defined the word 'conduct' to mean 'manage or operate'. In *Re Bhupalli Malliah* AIR 1959 AP 477 at p 480 para 9, the court defined the word 'conduct' to mean 'to lead, guide and manage'. These are simple self-explanatory words and I do not propose to go deeper than necessary in my quest to search for their meanings. As to the last power of discontinuance of any proceeding, I shall not touch on it as it is irrelevant for purposes of this case. Perusing s 376 of the Criminal Procedure Code (FMS Cap 6) it reads that the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code. In other words, from the above brief elucidation, his powers are wide. On this issue, I am reminded of the view of Suffian LP in the case of *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 at p 158 when commenting on art 145:

> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

The Public Prosecutor too may appoint fit and proper persons to be deputy public prosecutors who may exercise all or any of the rights and

powers vested in or exercisable by the Public Prosecutor except for certain rights or powers expressed to be exercisable by the Public Prosecutor personally. In other words, the deputy public prosecutor who is the alter ego of the Public Prosecutor with the entrenched delegated powers will advise, direct the investigation and thereafter deliberate on the possibility of a charge based on the investigation papers (see *PP v Mohamed Halipah* [1982] 1 MLJ 155 and *PP v Datuk Hj Dzulkifli* [1982] 1 MLJ 340). If the need arises, aside from personally conducting the prosecution, the Public Prosecutor may be required to attend to appeals, references and revisions. If I may detract, even for purposes of non-seizable offences, no investigations may be carried out unless 'an order to investigate' clearance is obtained first from the Public Prosecutor.

Any prosecution, be it involving non-seizable or seizable offences of which the latter is the more serious offence, attracting a punishment of three years' imprisonment or more will be conducted by the Public Prosecutor personally or by his deputy, a police officer not below the rank of an Inspector or certain persons who are authorized in writing by the Public Prosecutor. For non-seizable offences, the prosecution may also be conducted by the same personalities as above, and in respect of an offence against any law which is enforced by certain departments or authority, by their own authorized officers or by a private person for an offence against his own person or property.

In the lower courts, the prosecution is generally conducted by police officers not below the rank of Inspectors and in the process may seek out the advice of the local deputy public prosecutor. As said above, any discontinuance of the prosecution is also carried out at the behest of the Public Prosecutor.

At the outset, it must be stressed that, for non-seizable offences (like the matter before me), no investigation may be carried out by the prosecution as it is conducted solely by the police or other lawful enforcement agencies. It is trite law that it is the police and not the prosecution who are given the powers to arrest, detain or to seize properties in the authorized manner. The police whilst in the process of any investigation or carrying out of their duties will be bound by all the provisions in the Police Act 1967, Criminal Procedure Code and the Federal Constitution, eg art 5(3). Under Pt VII of the Police Act 1967 from ss 19–33 is the list of duties and powers of police officers. Suffice to say that the duties of a police officer are for the maintenance of law and order, the preservation of the peace and security of the country, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security and intelligence. The Criminal Procedure Code empowers the police to prevent the commission of crimes and to the best of his ability to employ all lawful means as provided by the Code to carry out his duties.

From the above dissection, it is quite safe to conclude that the police, with the supervision of the local deputy public prosecutor, have a specific jurisdiction. After having conducted a particular investigation, the police will then have to await the decision of the Public Prosecutor as to whether

A a charge is to be preferred against a suspect or not. At this early stage, the court's role is at its minimum, and invariably will not interfere with any decision making, either in the investigation or in the prosecution. The court's role begins when the matter is brought to court where not only the prosecution's rights are protected but also that of the accused. The latter's right is guaranteed by the Constitution and the court is there to ensure that B that right is not whittled away by some overly enthusiastic person with scant regard of the law. Under art 8 of the Constitution, all persons are equal before the law and entitled to the equal protection of the law though it operates only on all persons under like circumstances (see *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 at p 170 and *Datuk Hj Harun bin Hj* C *Idris v PP* [1977] 2 MLJ 155). Under art 5 of the Constitution, no person is to be deprived of his life or liberty save and in accordance with the law. Section 41B(1), which has taken away the right of bail of an accused person, is one of the provisions in the plethora of statutes at first sight which appears to overrule the general provisions of the Criminal Procedure Code pertaining the issue of bail and thus contravene art 5. Article 149 of D the Constitution on the other hand permits the promulgation of any law that may be inconsistent with some of the provisions of the Constitution.

Referring to the facts again, this clearly means that the Public Prosecutor's view and considered opinion were not sought before the charge was preferred against the accused. This encroachment of duties by E the police officer who decided to charge the accused in total disregard of the Public Prosecutor's powers, not only was against the interest of the accused but also an usurpation of the constitutional right of an institution. No reason was given to the court as to why the matter was not referred to the local deputy public prosecutor. For that matter, no written instruction F or circulars from the Public Prosecutor's office were exhibited by the prosecuting officer to show that for cases of this nature, investigating officers are permitted to charge a person without any prior consultation with the local deputy public prosecutor's office. To revert to the case of *PP v Ilamaran* [1992] 1 MLJ 672, Wan Yahya J at p 676A said:

G > If the amount of drug so seized and weighed warrants a charge under s 41B to be made, the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s 39B(4)) and neither will he be formally tried for the offence with which he had been tentatively charged until *the consent by the public prosecutor as required under s 39B(3) has been obtained.* (Emphasis added.)

H In fact, from the notes of the proceeding as succinctly recorded by the sessions court judge, not only was there a lack of communication between the police investigator and the Public Prosecutor's office, but also vis-a-vis that of the prosecuting officer who had the unfortunate task of appearing before the alert judge.

I The learned sessions court judge had seen it fit to grant bail on the basis that there still was uncertainty as to the weight of the drugs, the unavailability of a chemist report and was without the benefit of any good reasons to refuse bail. It cannot be overly emphasized that the laws of the country are very clear in that no person is to be deprived of his liberty

unless it is in accordance with the law. Much as I would like to commend the industry of the investigating officer in his desire to ensure that the public interest is protected, the constitutional rights of the accused in the process should not be relegated willy-nilly. I am fully aware of s 41B(2) which provides that bail shall not be granted notwithstanding any other written law or any rule of law to the contrary, but however potent this section is to the prosecution, the source of the Act, ie the Constitution must be read together with it.

To disregard the provisions of the Constitution would be against all tenets of construction of statutes, and by all accounts, the police was guilty of committing this fatal error. By his very own admission, the prosecuting officer had rebutted s 114(e) of the Evidence Act 1950 which says that the court may presume that judicial and official acts have been regularly performed. On the point whether the rights of the accused had been compromised by this prosecution by virtue of the fact that the local Public Prosecutor's officer was not consulted, I would like to refer to *Maxwell on Interpretation of Statutes* (12th Ed) at p 239 which reads:

> The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity', it will be resolved in favour of the person who would be liable to the penalty. 'If there is a reasonable interpretation which will avoid the penalty in any particular case', said Lord Esher MR, 'we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections.' (See also *Re A Juvenile* [1990] 3 MLJ 117 where Mustapha Hussain J held that penal terms have to be strictly constructed and interpreted.)

Under s 323 of the Criminal Procedure Code, I am given wide powers to examine the records for purposes of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of an inferior court and thereafter substitute it with another order if necessary. Wan Yahya J (as he then was) in *Hari Ram Seghal v PP* [1981] 1 MLJ 165 at p 166 when discussing s 323 of the Criminal Procedure Code said:

> The object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence.

Further, at p 168E, his Lordship said:

> The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

I do not believe that I am prevented from enquiring further into the matter and satisfying myself whether the pre-condition prior to the charging or whether any condition precedent to the disallowing of bail has been fulfilled. I take solace in the remarks of Ajaib Singh J where in the case of *Ho Huan Chong & Ors v PP* [1980] 2 MLJ 289 the court opined that:

A The provisions of s 41B of the Dangerous Drugs Ordinance are of a serious nature. They deprive a person of his liberty so that it becomes the duty of the court to see that the conditions under which an accused person is to be refused bail are strictly followed. It is true that on the face of it as the charge stands in the present case bail is not to be granted. But where bail for any offence is disallowed by law under certain circumstances, such as those B found in s 41B of the Dangerous Drugs Ordinance, then the court is perfectly entitled to inquire further into the matter and satisfy itself whether any condition precedent to the disallowing of bail has been fulfilled.

To reiterate the facts, the accused was charged under s 12(2) of the Act and by a stroke of bad legal luck, by virtue of the amount of heroin being C above 5g found in his possession, in the event he is found guilty, he is destined to be punished with a minimum incarceration of five years and ten strokes of whipping. To compound that legal position despite the uncertain weight, though at that stage still presumed to be innocent, he will have to languish in jail and spend a part of his life under remand for an indeterminate period until the case is completed. The additional D unpalatable fact confronting the court was the astonishing and cavalier attitude of the investigating officer in charging the accused without considering the rights of the accused and the powers of the deputy public prosecutor, even though mindful of the provisions of the Act which are already stacked high against the accused.

E With those legal principles expounded, matched against the facts disseminated by me, I find it necessary to exercise my powers of revision and substitute the order of the learned sessions court judge with that of an order discharging the accused not amounting to an acquittal.

Order accordingly.

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Reported by Akbardin Hj Abdul Kader

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